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Contestation in Global Norm Making

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ANTJE WIENER. *Contestation and Constitution of Norms in Global International Relations*. Cambridge, UK: Cambridge University Press, 2018.

INTRODUCTION

Antje Wiener presents an ambitious study of the process of norm constitution, contestation, and reconstitution in global politics. Crossing the fields of international law (IL), international relations (IR), and public philosophy, it engages in sustained theory building to address the book's core problematique: "whose practices actually do count for normative change" in global politics (3)? Building on the author's previous work (Wiener 2008, 2014) this book is a major feat, bridging IL and IR to provide a novel macro-theoretical account of global normative order building that has spurred a new generation of theoretical, empirical, and normative literature in IR. It provides an entry point for IR scholars into the field of sociolegal research on global norm making and, importantly, grounds normativity as a primary pursuit of IR norms theorizing.

A PROCESSUAL THEORY OF GLOBAL NORMATIVE CHANGE

Contestation and Constitution is driven by an empirical concern to show how the process of global normative change occurs. It does so by casting a lens on agency in the processes of norm constitution, contestation, and reconstitution through which norms emerge, consolidate, and transform. The book proposes that norms are always subject to contestation and change, yet IR theoretical approaches have long been interested in how norms effect change in state behavior, as opposed to understanding how norms themselves change. This assumption is a departure from the "first-generation" norms research in IR[1] that took norms as a social fact and as static in nature. Assuming that norms have a structuring quality in the production of global order, locating and explaining norm change offers empirical potential for studying global order and governance from the vantage point of multiple stakeholders at the micro, meso, and macro levels (local, regional, global) of global governance.

In choosing to focus on agency, *Contestation and Constitution* adopts a second quest: to provide an account of the *normativity* of norms in global norms research. Wiener

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1. For example, Finnemore and Sikkink (1998).

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pursues this objective by embedding the *quod omnes tangit* principle—"what touches all must be approved by all" (1)—as the central axiom for the book. She argues that by increasing equality of access to processes of norm contestation and norm validation, global justice is advanced, moving the central gravitas of global governance research from states toward those whose are governed and therefore have a legitimate stake in shaping norms' meanings-in-use.

A PRACTICE-BASED READING

According to Wiener, norms are generated through practice, and practice determines a norm's meaning-in-use: "[i]f a norm lies in practice, and practice is always norm generative, the repertoire of practices that count towards norm change in global society seems vast" (1). She argues that the field of IR—traditionally focussed on states—is ill equipped to recognize and engage the plurality of diverse agents whose practices contribute to the normative structure of global order. Drawing on the political philosophy of James Tully (detailed in Chapter 3), contestation is a permanent feature of democratic politics, and therefore opportunity for (global) citizens to engage democratic deliberation is a necessary condition for justice in global society.

Wiener's book shows how actors "criss-cross" legal and political normative orders, moving between micro, meso, and macro levels to engage in a "global multilogue" (7) through which norm constitution, contestation, and reconstitution occurs. Her theory incorporates both informal and formal sites of norm conflict and expands recognition of processes of norm validation from the social and formal to the cultural processes that are constitutive of the norm-making process. This move allows her to account for local-level agency in the constitution of global norms. As she states, "studying norms entails an approach that the 'interrelations between the two general fields of legal and nonlegal normative relationships in practice'" (4, quoting Tully 2012).

Theoretically, and methodologically, therefore, Wiener's approach is a radical departure from the traditional IR constructivist literature. Instead, her theoretical approach aligns with the sociolegal understanding of norms as interactive, developed in practice as fluid entities through which the boundaries between social and legal norms are imprecise (Brunée and Toope 2011a). Extending the purview of agency to the local level both accounts for hidden processes of norm validation and contestation that feed into global norm-making processes (evidenced in the case study chapters) and fulfills the normative requirements of deliberative democracy by granting recognition to diverse stakeholders who are affected by the norms in question.

The book is theory-heavy, with the first four chapters devoted to theory building, and requires a close reading to understand the organizing matrix that is operationalized in the case study chapters. It distinguishes between three types of norms in global politics: fundamental norms, organizing principles, and standardized procedures/regulations. These work from meta values through to more detailed and operational norms. It then introduces the "grid cycle" model (44), defining the three modes of norm validation (formal, social, and cultural) across three levels of governance (macro, meso, and micro) that is applied to the empirical chapters (Chapters 5 through 7).

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SANCTIONS, TORTURE, AND SEXUAL VIOLENCE

To study whose practices count in norm constitution, contestation, and reconstitution, Wiener examines three conflicts over global norms and objections to their breach. In each case, by connecting local contestation to global norm change, she studies two types of contestation—reactive and proactive—where the latter leads to norm transformation.

Wiener operationalizes the theoretical model through an exploratory as opposed to an explanatory approach. The three case studies each proceed through three steps. First, Wiener identifies the *normative opportunity structure* at relevant levels of governance pertaining to the norms under analysis. The normative opportunity structure refers to the formal institutional practices of normativity that constrain and enable the agency of affected stakeholders (51). Second, she maps the contestation by affected stakeholders using the grid cycle model to identify moments of norm conflict and change. Finally, she identifies changes in the normative structure of meaning-in-use within global politics. The exploratory approach brings into view proactive engagement with norm transformation and draws out the hidden or emergent norms at stake in the contestation process.

The case studies cover all three levels of governance, modes of norm validation, and the "criss-crossing" of varied legal and political orders.

Sanctions The first case study traces the *Kadi* case, where the breach of fundamental freedoms by the UN Security Council (UNSC) through the blacklisting of a Swedish national was legally contested through the European Court of Justice (ECJ) in 2001. In contesting the moral responsibility of the UN Security Council, the case was significant in challenging higher-level norms of legality and fundamental rights. Importantly, the ECJ challenged the moral authority of the UNSC in its ruling, with the consequence that "the EU's regional governance institutions are effectively pitched against that of the UN and its global governance institutions, especially the UNSC" (122). This led to a longer-term outcome of "a decline of the UNSC's role in sustaining moral leadership within a frame that has long been perceived as the liberal community of states" (123). Here norm conflict between the meso (regional) and macro (global) level organizations led to not only enhanced protection for fundamental freedoms but also a transformation in the normative structure of the meaning-in-use of the moral responsibility norm.

Torture The second case analyzes the contestation of the Global Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the United States in its use of interrogation techniques in Guantanamo Bay and Abu Grahib. In this instance of micro-macro contestation, an individual German human rights lawyer, Wolfgang Kaleck, appealed to the Geneva Conventions, the UN Convention against Torture, and the German Code of Crimes against International Law to bring a criminal indictment against Donald Rumsfeld, former head of the CIA, for violations of the torture prohibition norm. Although the proceedings were eventually dropped, the case reveals two high-level contestations: the US government justifies the use of torture in the global war on terror, reducing the moral reach of the antitorture norm from a fundamental norm to a procedural norm; and a global network of lawyers defend international law across multiple jurisdictions and bodies of international and domestic law. These networks were crucial in advancing the moral

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reach of the universal jurisdiction norm, their "victory" attained through their advocacy and the increased profile of global criminal prosecutions for breaches of the torture norm, not through a legal success in the form of prosecution (160–61).

Sexual Violence The sexual violence prohibition norm also shows the interaction between micro and macro levels, with an emphasis on the role of former British foreign minister William Hague in elevating the norm in national and international policymaking. The chapter shows how reactive contestation prior to the passing of UN Security Council Resolution 1325 on Women, Peace and Security in 2000 was followed by significant proactive norm contestation through which a transformation in the norm's meaning-in-use occurred. The contestation over the prohibition of sexual violence against women and girls in wartime were transformed through the association of the norm with international security (wartime rape constitutes a threat to international security) and the norm addressing a "culture of impunity" through which rigorous data collection and accountability procedures would be developed. As with the torture case, individual advocacy at the national level was effective in norm transformation, in this case emphasizing social and cultural validation.

For IR scholarship, the move to transcend state behavior as a measure of "change" in the field of norms research has been highly productive. Even more useful for opening sites and modes of research in IR, perhaps, are the attention Weiner has given to movement across political and legal orders and the growing interconnection between global networks of actors engaging in proactive contestation that moves past formalistic analysis of norm making and transformation.

BRINGING INTERNATIONAL RELATIONS INTO CONVERSATION WITH SOCIOLEGAL THEORIES OF NORM CHANGE

With a focus on norm-generative practices, many of the arguments regarding the sociological nature of norm constitution and change in Wiener's book will not be new to sociolegal scholars of global lawmaking. The role of domestic-level actors, including lawyers, legislators, and civil society actors, in contesting and co-constituting international law has been extensively examined in this literature (Halliday and Shaffer 2015; Merry 2015). The turn in sociolegal inquiry to global lawmaking developed in the field of international law at a similar time as theories of international norms in IR. However, the theoretical assumptions and modes of analysis between IL and IR remained largely autonomous throughout the 1990s (Keohane 1997), with even less interaction between sociolegal and IR analysis of international norms. Wiener's book comes a long way in bridging conversations between these fields, bringing sociolegal analysis of lawmaking explicitly into the purview of IR norms theorizing.

To this end, *Contestation and Constitution* interacts with sociolegal scholarship on global lawmaking by simultaneously situating the process of lawmaking into the domain of practice and conceptualizing the boundary between social and legal norms as fluid. It shares a commitment to legal plurality through which multiple value systems can be accommodated in global society. Brunée and Toope, for example, promote "diversity of priorities in international society" (2011b, 316), a justice commitment that is carried through Wiener's book with reference to the *quod omnes tangit* principle.

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Perhaps the major challenge that Wiener's book raises in seeking to transcend the state into the micro-practices of global norm-making processes is the problem of how local we can go in theorizing global normative change. Wiener selects three cases of norm conflict and "zooms-in" on agency and process to explain where norm conflict emerges and to trace the contestation leading to normative change. However, despite going domestic in the micro level of analysis, the actors remain elite law makers, IO bureaucracies, and politicians.

What happens when we take into account the periphery? For the norms selected—fundamental freedoms, torture, and sexual violence—the focus on ECJ proceedings, US and European policy makers and lawyers, and UK politicians respectively does not capture the voices and experiences of stakeholders that *lack access* to contestation. The book is critical of the normative implications of unequal access to norm validation and contestation and seeks to rectify this power imbalance through a philosophical commitment to multilogue with stakeholders affected by those norms. Yet the decision to zoom in to three separate cases closes down opportunity to engage with a wider range of stakeholders around a given issue area whose voices are not included.

Equality of access, a metric of normativity in this book, points to the need for future research that widens the range of stakeholders below the state and beyond elites and their privileged access to processes of norm validation. Sociolegal research on global norm making has responded to this challenge through sustained attention to a single case and anthropological fieldwork (Merry 2006). Recent IR interventions have also shown the value of employing Wiener's concept of cultural validation as a mechanism for researching domestic processes of norm implementation that goes deeper in tracing local agency of those directly affected by norm violation than Wiener's chapter on sexual violence (in which cultural validation was operationalized). Echoing the anthropological insight from earlier sociolegal research, the latter integrates a wide representation of affected stakeholders that are typically marginalized in analyses of elite policy and lawmaking processes (Auethavornpipat 2022).

There is one more internal paradox that Wiener's thesis raises in seeking to benchmark normativity on the principle of equal access: the reality of repressive and authoritarian access to norm contestation in international institutions. Organizations such as the UN are founded on liberal values and facilitate global deliberation. Yet practice within deliberative bodies such as the UN Security Council and Human Rights Council shows that antiliberal agendas have been pursued by a small number of states that have effectively silenced the agency of weaker states in the international system.

What happens when those actors use channels of global deliberation and governance to contest norms that lead to the erosion of the very norms of democratization and equality of participation that norm contestation theory advocates? Expanding recognition of agency and access aligns with the philosophical commitments in the book to extending agency to those who are governed. Yet through these processes, a concert of actors are pushing back on these very principles through normative contestation that has the consequence of closing down genuine representation of stakeholder voice (Jacob 2020).

To close, *Contestation and Constitution* is a valuable contribution that provides a window for closer engagement between sociolegal research on global norm making and IR. It provides tools and resources to expand inquiry of local-global norm-making

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processes in ways that extend the sociolegal focus on law to include multiple interacting normative orders and to account for a wider range of stakeholders by adding the process of cultural validation alongside formal and social validation. Subsequent scholars have taken this agenda and developed the access and reach of IR norms literature through more detailed case studies in areas where legal traditions and institutions are much less robust than in the European, British, and US contexts.

That said, where there is illiberal contestation of foundational norms of global politics, such as human rights, and indeed nonaggression, as recently witnessed in the Russian war on Ukraine, limits to the democratizing effects of contestation appear to be reached. Perhaps informal modes of social and cultural norm validation theorized in this volume are channels to bypass formal processes, but these questions remain unanswered and not yet empirically tested. There remains plenty of fertile terrain for research to advance and for closer conversations among IL, IR, and sociolegal scholarship on such high-stakes questions pertaining to the future of global order(s).

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